

NOVA SCOTIA ADMIRALTY DISTRICT.

1919

March 29.

HANS JACOBSEN,

PLAINTIFF;

v:

THE SHIP "FORT MORGAN",

DEFENDANT.

Contract of Hire—Law of the Flag—Improper Discharge—Norwegian Maritime Code; Admiralty Act 1861, Sec. 10 and sections 9 and 12.

Held.—1. That section 10 of the Admiralty Court Act, 24 Vict. (Imp.) 1861, which extends the jurisdiction to "any claim by a seaman of any ship" permits the application by the court of the law of the Country of the litigants.

2. That a contract or engagement between a Norwegian owner and a Norwegian master, for services to be rendered on a Norwegian ship, registered in Norway, although verbally made in New York, U. S. A., is governed by the law of Norway.

3. That where a change in destination of a ship is made, the crew can legally refuse to continue on terms of existing contract.

4. That in such event, where the new terms asked are not accepted by the owner, members of the crew are entitled to legal notice before being discharged.

This case has been appealed to the Supreme Court of Canada, and is still pending.

THIS is an action by the master of S.S. "Fort Morgan" for back salary due at date of discharge and damages for wrongful dismissal.

The plaintiff claimed that he left New York in July, 1918, under orders from his owners to proceed to Halifax, N.S., and thence to the West Indies. At that time his remuneration was fixed at \$343.75 per month. The vessel arrived in Halifax and offers of charters to the West Indies were made and declined. On August 8 the owners notified the plaintiff that

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the vessel was to proceed to St. John's, Newfoundland, and there to load a cargo for Italy or Greece. The Master declined to go into the war zone unless his salary was raised to an amount greater than the wages of the Chief Engineer. The owners refused to give the Master what he asked, and sent a new Master and crew, upon whose arrival on August 24, the Master left the ship and returned to New York and rendered his account to the owners. And it is for the balance of his account, plus three months' wages and the cost of his return to Norway, that this action is brought.

The defendant claimed that the plaintiff was the Master of the ship "Fort Morgan" from January, 1918, to a date between August 15 and August 30, 1918. His contract was a verbal one made with Frederic Anderson, the ship's agent in New York.

In the latter part of July, 1918, the ship reached Halifax; and about August 6, 1918, plaintiff received a charter-party from Anderson in New York. This charter-party was from St. John's Newfoundland, to Italy or Greece with a cargo of fish. The crew except a sailor, two mates, the chief engineer and plaintiff refused to go. The master reported to Anderson that he wanted \$450.00 but not less than the engineer. Anderson refused to pay \$450.00, but however, he sent a schedule of wages shewing an increase to plaintiff for the transatlantic voyage.

Anderson offered the master \$400.00. He had been receiving \$343.75 per month; a new crew was put on the vessel as plaintiff refused to sail without \$450.00 a month, and plaintiff left the boat.

Plaintiff is a Norwegian; and the defendant ship is registered at Grimstadt, Norway.

The case came on for hearing at Halifax on the days of 1919.

Mr. Perkins, counsel for plaintiff argued that:

- (a) The plaintiff was wrongfully dismissed; and
- (b) that the Norwegian Law should be applied in determining the Master's rights to recover, the engagement having been made by a Norwegian owner with a Norwegian Master for service on board a Norwegian ship, and the parties evidently intending that the contract should so be governed.

Primâ facie the law of the flag governs.

The extension of the application of foreign or municipal law may be attributed to The Admiralty Court Act 1861 (24 Vict. Cap. 10), Section 10 of which extends the jurisdiction of the Admiralty Court to "any claim by a seaman of any ship". That section 10 is intended to embrace the claim of a seaman of a foreign ship is evident from the use of the words "any British ship" in Sections 9 and 12.

If the Court has jurisdiction to entertain the claim of a seaman of a foreign ship, which may involve questions of right, as well as of remedy, it can hardly be contended that the Court may not apply the law by which the parties intended those questions to be determined.

The *lex fori* is in favor of plaintiff.

The plaintiff was engaged for a voyage to Halifax and thence to the West Indies; before the voyage was half performed his engagement was altered and he was ordered to the war zone.

That the proposed engagement was of a different character from the original arrangement may be inferred from the fact that all on board, including the Master and Chief Engineer, were offered a higher

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wage to go into the war zone. The Master cannot be charged with a breach of contract in refusing to proceed on the new voyage and if he was not guilty of a breach of contract in so refusing it follows that the alteration in the engagement constituted a breach of contract by the defendant; and when the defendant sent a new Master it was tantamount to dismissing the plaintiff. As the Master was ready and willing to carry out the original engagement made by the defendant with him, such dismissal was without cause.

The discharge of the Master was also wrongful because it was in breach of the owner's agreement that the Master's wages should be more than those of any other member of the crew.

Another ground for holding that the Master's discharge was wrongful is to be found in the defendant's admission that the Master's engagement was a monthly one.

And the notice that another crew would be sent was given to the Master after August 16 and the Captain replacing him arrived on August 24, so that he had less than three weeks' notice.

English common law gives seamen improperly dismissed the same redress as does the Norwegian statutory law; and damages are given in the Admiralty Court for wrongful discharge.

English common law is also the same, as to the right to passage money in case of wrongful dismissal, as the Norwegian statutory law.

The Admiralty Court has always exercised a paternal jurisdiction in favor of seamen and it should weigh with the Court that if the plaintiff is refused redress here and driven to apply to his own Court

in Norway, he will lose the benefit of the lien which is given to him by the arrest in this action.

Mr. Butler, counsel for the defendant, argued:

(a) that plaintiff was not wrongfully dismissed,
 (b) that the Court cannot enforce or give effect to a regulation or statute of Norway.

There was only one conversation between plaintiff and Anderson at which the terms of the contract were discussed.

Anderson and Jacobsen agree that the hiring was at so much a month and the engagement was therefore monthly.

The captain was aware that another crew was being sent. It is stated by Jacobsen in his evidence that Anderson paid the engineer \$400.00 but the engineer Jacobsen refers to is the man who finally sailed and who came with the new crew after the Master's refusal to go for less than \$450.00.

It is submitted that the Master, having left during the month is not entitled to any wages for the part of the month he worked.

It is suggested that the Master was to go to the West Indies on arrival at Halifax, but any such agreement was a *bare promise* on Anderson's part. It is evident Anderson did not know where the ship was going when she left New York for Halifax. The agents' offer to raise the wages on the voyage to Italy was gratuitous. From the nature of the employment, the fact that the defendant was a ship able to go anywhere, that the Master knew there was a war when he engaged, the Master was not justified in refusing to sail as other vessels did, but he was bound to finish his month and give reasonable notice to his employer. It was his own wrongful act that

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terminated the engagement and he cannot take advantage of it.

The law under which plaintiff claims to be entitled to recover is a Norwegian statute or regulation. There is no evidence that there is an action under Norwegian law analogous to the common law action of damages for wrongful dismissal; nor does the plaintiff pretend to claim damages for wrongful dismissal at common law. A great deal of stress is laid by plaintiff on the right of a foreign Master to recover damages for wrongful dismissal in an action founded on English law in the Admiralty Court where the breach occurs in the jurisdiction. Defendant does not deny this; but plaintiff's action is for compensation only under the Norwegian statute.

Municipal regulations or statutes of a foreign country are not enforced by English Courts. This is not such a matter as is incidental to the rights of parties under English law where foreign evidence (e.g., of the legality of a marriage ceremony) might be required; but it is an effort to directly enforce the foreign law and found the jurisdiction of the Court thereon.

The right to obtain the compensation defendant claims is acquired under Norwegian law not under Canadian law. If this regulation were part of the contract there might be another result.

There is no serious dispute on the facts which are contained in the above summary and in the following arguments. The Judge found that plaintiff was discharged without notice and that he would be entitled to compensation for such damage, and he referred the matter to the Registrar to fix the amount due.

The Sections of the Norwegian Maritime Code are printed herein and are as follows:—

“63. If a Master is dismissed on account of incapability, fraud, or negligence or carelessness while in the service of the ship, he shall only be entitled to wages up to the time of his dismissal.”

“The same rule shall apply if he is dismissed because the voyage is given up, or not continued, or put off for a long time on account of war, blockade, embargo, prohibition of imports or exports, detention by ice, or damage which unfits the ship for voyage.”

“If the ship is wrecked, condemned, captured or condemned as a prize, or taken by pirates, the service of the Master, and, consequently, his right to further wages, shall cease. In the case of a casualty having occurred he must, however, remain on the spot until the affairs of the ship and the cargo have been settled, but he is entitled to reasonable compensation for the time thus passed.”

“64. If a Master is dismissed on account of illness, or injuries, which incapacitate him from commanding the ship, he shall be entitled to wages up to the date of his dismissal.”

“If, during his service on board the ship, the Master has, through no fault of his own, contracted an illness, or been injured, the owners shall pay the expenses of his medical treatment and attendance also after his dismissal, but not for more than 4 weeks after the date of his dismissal when such takes place in Norway, or at a place in a foreign country where, according to the agreement, he was to leave the ship, but until 12 weeks after the said date when the agreement is otherwise.”

“65. When the Master is dismissed under any other circumstances than those referred to in 63

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"and 64, he shall be entitled to the whole amount of
"the wages for which he has stipulated. If not en-
"gaged for any fixed term he shall receive, besides
"his wages for the time during which he has served
"on board, the following additional wages:

"For one month, if he is dismissed in a Norwegian
"port at any other time than that when, according
"to S. 62, he is himself entitled to leave the ship, or
"in a Baltic or North Sea port;

"For two months when dismissed in any other
"port in Europe, and

"For three months, when dismissed in a port out
"of Europe; Mediterranean ports or ports on the
"Black Sea and the Sea of Azov being, however, in
"this respect, considered as European ports.

"The same rule shall apply when the Master
"leaves on account of the ship having lost its right
"to carry the Norwegian flag."

"66. When, in the case referred to in 65, the ser-
"vice of the Master is terminated at any other place
"than that agreed to or assumed by the terms of the
"contract, he is entitled to demand compensation
"from the owners for his travelling expenses, in-
"cluding subsistence money, to the place at which
"he was engaged if in Norway, but otherwise, to that
"port to which the ship belongs. The same rule
"shall apply when in the cases referred to in the
"second section of 63, the Master is dismissed in a
"foreign country, or left behind abroad on account
"of illness, provided the owners are bound, accord-
"ing to 64, to pay for his care and maintenance."

This law was proved by the testimony of the Nor-
wegian Consul General of the United States, refer-
ring to a book containing the same.

DRYSDALE, L.J.A. (No date), gave decision as follows:—

The plaintiff, master of defendant ship, came to Halifax with a view to a West India charter re a salary of \$343.75 per month. After remaining here the owners chartered the ship for the war zone and offered the captain and crew an increase of wages provided they agreed to go to Italy. The plaintiff refused the wages and was discharged here without notice. Under the English law the plaintiff would be entitled to compensation for such damages.

The plaintiff is a Norwegian and the defendant ship is owned by a Norwegian and registered in Norway, and I think such compensation should be fixed by analogy to the Norwegian Maritime Code.

In the event of a discharge under the circumstances here, such code fixes the compensation at three months' salary and the price of transport to Norway. This the plaintiff is entitled to, and I refer the account to the Registrar to be made up on this basis.

DRYSDALE, L. J. A., (March 29, 1919), delivered final judgment as follows:—

On March 29, 1919, before the Honorable Mr. Justice Drysdale, Local Judge in Admiralty.

The Judge, having heard the parties and their counsel, pronounced in favor of the plaintiff's claim, and condemned the ship "Fort Morgan" and her owner and their bail in the amount to be found due to the plaintiff, and he ordered that an account should be taken and referred the same to the Registrar to report the amount due, and the Registrar having reported the sum of \$1,888.85 to be

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due to the plaintiff, and the said report having been filed herein on March 9, 1919.

The Judge now in application of the plaintiff, pronounced in favor of the plaintiff's claim for the said sum of \$1,888.85 and costs, including the costs of the reference, and condemned the ship and her owner and his bail in the said sum of \$1,888.85 and the said costs to be taxed.

Judgment accordingly.

Solicitor for plaintiff: *W. H. Fulton, K.C.*

Solicitor for defendant: *W. L. Hall, K.C.*